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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

CRESCENT EXPRESS LINES, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., *et als.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR HUDSON TRANSIT LINES, INC., APPELLEE.

JAMES F. X. O'BRIEN,
Attorney for and of Counsel with Appellee, Hudson Transit Lines, Inc.

Dated: November 1, 1943.

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Opinion Below.

The opinion of the District Court, written by Circuit Judge Learned Hand (R. 30-36), is reported in 49 F. Supp. 92.

Jurisdiction.

The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (28 U. S. C. 45a, 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, par. (4) (28 U. S. C. 345); and

Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)).

The final decree of the District Court was entered March 6, 1943 (R. 49), and petition for appeal and order allowing it was filed April 16, 1943 (R. 36).

Statement of Case.

This appellee will accept and rely upon the detailed Statement of Case in the brief of the United States of America and the Interstate Commerce Commission. It, however, desires to roughly outline the prior proceedings in order to correct any erroneous impression which might arise from appellant's Statement of Case.

Appellant's predecessors were engaged in a specialized type of passenger transportation which might well be called interstate livery service. They were so engaged on June 1, 1935, and filed application with the Interstate Commerce Commission as Grandfather claimants seeking a certificate to continue their prior service (R. 43-54). Failure to prosecute their application caused the Commission to call them to informal hearing by letters (R. 55-56). They appeared at informal hearing and presented proof in questionnaire form (R. 57-58), a map showing their operations (R. 59), and proof of their prior operations and continuance thereof in the form of affidavits (R. 62-76), and circulars used by them showing their highly specialized type of service (R. 77-83). Based on the informal hearing and the proof submitted by applicant, there being no proof submitted by any protestant, the Commission issued a compliance order May 7, 1938 (R. 99-100), which inadvertently specified their service as a regular route service, and which, if it became effective, would permit an operating authority exceeding that applied for and proven by applicant's own evidence.

This was not a certificate but a mere compliance order which, by its terms, permitted interested parties to protest it within thirty days after its date (R. 100). Such protest in the form of exceptions and petition was filed within the thirty days (R. 101-103). The Commission issued a corrected compliance order, not in response to the protest, but to correct typographical errors, which compliance order was dated June 20, 1938 (R. 103-105). Immediately thereafter protests were filed within thirty days from the date of that order (R. 105-109). The orders never became effective, and the Commission notified all parties that the objections warranted a further investigation of the case, and it was referred to the field for that purpose (R. 110-111).

On page 3 of appellant's brief, it creates the impression that, after the order of June 20, 1938 was issued, nothing further happened until the Commission on September 2, 1941 issued the order from which appellant has appealed in these proceedings. This is not so, as indicated by the statements above showing the protests against the order and the reference of the matter for further investigation.

In addition, appellant neglects to state that during this period of time the question of the Commission's right to fully and adequately specify the service to be rendered by specifying among other things the type of vehicle to be used, was being litigated before the Commission. This litigation extended over a period of years, before Examiners of the Commission, before Division 5 of the Commission, and before the Commission as a whole.

After an incorrect interpretation of its statutory rights, the Commission finally on reconsideration fixed and determined the applicable law. This was in the case of *Irving Nudelman*, Common Carrier Application, reported

in 28 M. C. C., page 91, and decided February 25, 1941, by Division 5 of the Commission, which decision was affirmed without additional opinion by the Commission as a whole.

After this law had been fixed and determined in 1941, the Commission was in a position to issue a proper compliance order based on the uncontested facts in the Crescent application. It proceeded to do so, and specified applicant's service so as to permit it to render the same type of service it had rendered on and prior to the Grandfather date (R. 115-117). Appellant protested this order before Division 5, and submitted written argument in brief form (R. 119-120). There were replies to this brief (R. 121-131), and, after Division 5 had rejected the argument and denied the petition (R. 131-132), applicant filed further protest and submitted written argument in brief form (R. 132-136) to which replies were again made (R. 136-158). The last argument of applicant was addressed to the Commission as a whole, which rejected its argument by order issued March 17, 1942 (R. 158). Applicant again petitioned the Commission as a whole for further consideration (R. 158), which petition was considered and relief under it denied (R. 167).

In all of its protests above mentioned, applicant never claimed it had other facts to present above and beyond those it had already presented to the Commission at the informal hearings, and in its argument in support of its protests applicant argued questions of law opposing the legal interpretations adopted by the Commission in the *Nudelman* case. Appellant's objections related not to factual issues but to legal issues, to wit, the Commission's power to apply to the undisputed facts of the case the legal interpretations which were applied in line with its final determination in the *Nudelman* case.

Appellant filed complaint in the District Court which,

after oral argument and briefs, handed down a written decision (R. 30-36), which is a clear, concise statement of the fact and the law of the case. A decree and findings of fact and conclusions of law (R. 28-29) were entered, and appellant has appealed to this Court.

The Issues.

The underlying issue is a simple one.

Appellant does not want to be restricted by the Commission's certificate to an authorized service having a substantial parity with its prior bona fide Grandfather operations. It is not satisfied with authority which permits the type of service conducted by it on and prior to the Grandfather date. It wishes authority which will permit it to conduct a type of service never rendered by it on and prior to the Grandfather date. It objects to the Commission's specification of service which produces the substantial parity between the prior bona fide operations of appellant and the future authorized operations. Although given all that it asks in its applications, and although permitted the very type of service its own proof disclosed it rendered on and prior to the Grandfather date, appellant is not satisfied. It wishes to enter into a new field of competition and wants the same kind of a certificate issued only to regular route scheduled bus operations.

The issues appellant presents in support of the underlying issue appear to be three-fold.

First Issue:

Appellant contends that the proviso at the end of Section 208(a) of Part 2, Interstate Commerce Act, (and which Section is Section 308(a), Title 39, United States

Code), prohibits the Commission from specifying the service to be rendered in terms of the vehicle to be used.

Second Issue:

Appellant contends that in specifying the service to be rendered, the Commission has no right to define it as irregular route, door to door, non-scheduled, special service, because the statute does not contain an authorization to the Commission to use such a definition.

Third Issue:

Appellant contends that the Commission had no right to enter its order of September 2, 1941, from which appellant appeals, because no factual hearing was held between that date and the date of its prior compliance order, June 20, 1938, which said 1938 order was protested with the result that the matter was referred for further investigation. Appellant contends that since protests were filed to its application, the Commission erred in not giving protestants a hearing, and erred in accepting the undisputed evidence submitted by appellant itself.

Summary of Argument.

Point I.

The Commission and the Court below interpreted United States Code, Title 39, Section 308(a) (Section 208(a), Interstate Commerce Act, Part 2), so as to require the Commission in issuing its certificate to define and specify the service it authorized appellant to render so as to assure a substantial parity between that authorized service and appellant's prior bona fide Grandfather service. They held that the proviso at the end of this

paragraph, which declared no restrictions should be imposed upon the right of a carrier to add to its equipment and facilities within the territory specified in the certificate as the development of its business and the demands of the public required, did not ham-string the Commission in such a way as to prevent it from fully carrying out the legislative mandate set forth at the very beginning of the same section, which required the Commission to specify the service to be rendered and the routes or territory within which it could be rendered, when the Commission issued a certificate authorizing operations. They held that it did not prevent the Commission from restricting appellant to the same type of service it had rendered on the Grandfather date, and held that the proviso referred to the quantity of the service which could be given as the demands of the public and the business in the territory increased, and that the proviso had no reference to the quality or character or type of service. These holdings are supported by an examination of the particular Section, by an examination of the preamble of the Motor Carrier Act, 1935, with particular reference to the expressed purpose of the Act as originally contained therein, and by reference to the interpretations of the Act in this Court in the cases of—

United States v. Maher, 307 U. S. 148;
United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475;
Noble v. *United States*, 319 U. S. 88, 63 Supreme Court Reporter 950.

The interpretation of the Commission and the Court is the only one which can carry out the purpose of the Act, and is the only reasonable interpretation when considered in the light of the entire Section of the Act involved, and when that Section is considered in the light of the entire Act.

Point II.

The Commission could not carry out its legislative mandate if it were not permitted to specify and define the authorized service in such a way as to actually and fairly define it in the terms of the type of service rendered by appellant on and prior to the Grandfather date. The record adequately supports the action of the Commission in its definition of appellant's service as the same is contained in the order of September 2, 1941 (R. 115-117).

Point III.

The Commission accepted the undisputed testimony of appellant, as contained in its predecessor's applications, and as contained in the evidence submitted by it at the informal hearings. To these undisputed facts, it applied the law as it was determined and as it existed on September 2, 1941. This was its obligation in line with the holdings of this Court in the case of—

Ziffrin, Inc. v. *United States*, 318 U. S. 73, 63 Supreme Court Reporter 465.

Argument.

POINT I.

Appellant bases its main claim on appeal to the proviso appearing at the end of Section 208(a) of Part 2, Interstate Commerce Act. This is Section 308(a) of Title 39, United States Code, and reads as follows:

"Sec. 308. (a) Any certificate issued under section 306 or 307 shall specify the service to be rendered,

and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, the requirements established by the Commission under section 304 (a) (1) and (6): Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Appellant claims that the proviso at the end of the above section permits it to add vehicles of whatever type may be reasonably necessary as its business and the demands of the public may require. It contends that this right to add to its equipment and facilities is not a mere right to give as much additional service as the business and the public demand requires. It contends that it has the right to add vehicles of any kind, even though the effect of using a different kind of vehicle would be to radically change the type of service theretofore rendered by it. It therefore contends that the Commission, in carrying out the mandate to "specify the service to be rendered" as set forth in the very beginning of the above Section 308(a) is limited, and that the Commission cannot specify the service to be rendered and include in that definition the type of vehicle to be used, even where it is

necessary to specify the type of vehicle to be used in order to adequately and fully specify the service to be rendered.

The logical conclusion of appellant's contention is that even if the change in the type of vehicle were to work a complete change in the type of service, none the less the Commission is powerless to define the service in such a way that this change could not take place.

Such an interpretation is at odds with the clear intent of the section when it is read as a whole.

Once the Commission has carried out its mandate by specifying the service to be rendered, then it cannot restrict the carrier from adding to its facilities in order to give as much more of that type of service as its business increase and the public demands may require. That is the only reasonable interpretation of the Section.

When this section is considered in the light of the entire Act, and particularly in the light of the expressed purposes of the Act as contained in Section 202 (a), which was the declaration of policy contained within the Act prior to its revision in 1940 under the title "Transportation Act of 1940," we see that the Commission and the Court were entirely correct in their interpretation, and that appellant's claimed interpretation is necessarily wrong. That declaration of policy declared it "to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

This Court has held in the cases of—

Price v. *Forest*, 173 U. S. 410, and
Rector v. *United States*, 143 U. S. 457,

that the preamble may be referred to in order to ascertain the legislative intent, and that the Court will con-

sider the evil intended to be remedied in seeking the correct interpretation of an Act.

Likewise this Court has held that the objects and policy of the law will be considered in interpreting it, and that the entire statute must be considered rather than giving an undue effect to particular words or clauses, and also that the intent of the law may not be defeated by rigid adherence to the strict letter.

Helvering v. *New York Trust Co.*, 292 U. S. 455;
Costanzo v. *Tillinghast*, 287 U. S. 341;
Barrett v. *Van Pelt*, 268 U. S. 85;
Fleischman v. *United States*, 270 U. S. 349.

The intent of the law cannot be carried out and sound economic conditions in the industry cannot be fostered if the proviso in Section 308 (a) is interpreted so as to permit a carrier to add different types of vehicles which will have the effect of changing the type of service previously rendered by it. When this happens, it enters into new competitive fields without any proof of necessity and convenience. Congress intended to permit Grandfather carriers to carry on the same type of service operated by them on June 1, 1935. It did not and could not have intended to permit them to change that type of service without proving necessity and convenience therefor. Section 306(a) of Title 39, U. S. Code, merely permitted continuance of prior bona fide operations without having to prove convenience and necessity therefor. Obviously, since it dispensed with that proof, the operations permitted to be continued could only be the same as the prior bona fide operations. Chaos would result if carriers were free to change their type of service and enter into new competitive fields. The Commission, in effect, would have but little authority over Grandfather carriers, if appellant's contention were correct.

Appellant's contention, carried to a logical conclusion, may be illustrated as follows:

Frequently motor bus carriers are permitted and authorized to carry express parcels in the same bus with passengers. Assuming appellant to be correct, if this parcel express business increased, such carrier could purchase a truck and run it behind the bus to carry these parcels and express. If it could do that, it could run the truck independently. Then it might obtain quantities of oil in tins or drums and carry such packages as express. Then, if demand arose, it could carry such oil in bulk in tank wagons. Thus, we would have a passenger bus carrier stretching his Grandfather authorization to carry parcels and express into the general competitive field of truck commodity carriage and into the other general field of tank wagon bulk carriage. All of these are separate fields of endeavor, all regulated and confined to their own spheres under the law as presently interpreted by the Commission, but if appellant is correct all of the thousands of Commission orders and decisions which constitute the basis of its motor carrier regulation would substantially fall. Any interpretation which would produce such an unreasonable effect, which would destroy the whole intent and purpose of the statute, cannot be the correct interpretation.

This Court held in the case of—

United States v. *Maher*, 307 U. S. 148, at p. 155, in referring to the pertinent section above quoted:

> "That any certificate issued under Section 206 or Section 207 shall specify the service to be rendered."

This Court also held in the case of—

United States v. *Carolina Freight Carriers Corporation*, 315 U. S. 475,

that:

> "As we indicated in *Alton R. Co.* v. *United States*, *supra*, the purpose of the 'grandfather clause' was to assure those to whom Congress had extended its benefits a 'substantial' parity between future operations and prior bona fide operations. * * * And consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed. That is not this case."

In the case of—

Noble v. *United States*, 319 U. S. 88, 63 Supreme Court Reporter 950,

this Court passed upon a point which, by analogy, disposes of appellant's appeal. That was a case like the present one in which the Commission at one time had followed an erroneous view of the law and had corrected it and specified in the authority issued the type of business permitted under that authority. It limited the authority to that corresponding with the Grandfather operations. In rejecting a claim similar to the claim of appellant herein, the Court said:

> "Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for

a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a variety of articles. * * * If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act would be frequently disregarded. *The 'grandfather' clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935.*" (Italics ours.)

The interpretation of the Act by this Court supports the interpretation of the Commission and the Court below.

The Commission found it necessary, in the type of operation such as conducted by appellant; to define and specify the service to be rendered in terms of the vehicle used, as well as in other terms. This was clearly indicated in the Commission decisions in the case of—

Sullivan County Highway Application, 21 M. C. C. 717,

and in the Commission's decisions in the application of—

Irving Nudelman (and fifty-eight other operators), 28 M. C. C. 91.

Appellant's operations were not only the same type of operations as those covered by the Commission's decisions above mentioned, but were between the same territories, and the Commission had merely withheld final authorization to appellant and others in a similar category until it had passed on the legal questions which arose in the first batch of such cases heard by it.

Before the Commission came to the correct interpretation of the law, Commissioner Eastman, in his dissenting opinion in the *Sullivan County* case, 21 M. C. C. 717, said:

> "I think it clear that the character of service which was rendered on and before the Grandfather date was differentiated by the use of the vehicles of the sedan type. * * *
>
> Applicant should, I believe, be restricted to the use of vehicles of the sedan type."

Likewise, the Commission in the case of—

> *Irving Nudelman*, Common Carrier Application, 28 M. C. C. 91,

said, at page 95:

> "Because we have the power to restrict a carrier to the use of certain types of vehicles in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

At the same page, in discussing the operations therein, which were the same as appellant's Grandfather operations, the Commission said:

> "Motor vehicles having a capacity of seven passengers or less are peculiarly suitable for this type of operation."

On the same page, the Commission stated that the type of service in question was materially different from that performed by operators utilizing buses in regular route, scheduled operation between fixed termini.

The Crescent application shows that seven passenger sedans were the only vehicles operated by appellant's

predecessors on and prior to the Grandfather date. The supplemental application filed March 26, 1937, in Exhibit A, V, (a) and (b), indicates that the only vehicles owned and used by Crescent were six sedans (R. 48). Likewise, the affidavits used by appellant's predecessors to prove their operations indicated that only such vehicles were used (R. 64-76) as does also the Exhibit offered by them and filed with the Commission at that time (R. 78). Appellant does not contest this, and in fact admits on page 19 of its brief that "it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating seven persons."

The Commission has held that Sections 206(a) and 208(a) (United States Code, Title 39, Sections 306(a) and 308(a)) must be read together.

In the case of—

Dominick Machise, Common Carrier Application, 27 M. C. C. 668,

the Commission said:

> "The two sections are linked in subject matter, and must be read together. • • •
>
> The service rendered by a motor carrier involves a number of considerations, including such factors as commodities transported, *equipment used*, and degree of specialization in particular phases of motor carrier transportation. • • •
>
> Any other conclusion would not only disregard the difference in the essential characteristics of the two types of service, but also would be contrary to the national transportation policy, which requires us to foster sound economic conditions in the motor carrier industry." (Italics ours.)

In both the *Noble* case and the *Carolina Freight Carriers* case, above cited, this Court held that the precise

delineation of an enterprise which seeks the protection of the Grandfather clause has been reserved for the Commission, and that the scope of the certificate entails a weighing of the evidence and the exercise of an expert judgment on the intricacies of the transportation problems involved, and that such function is reserved exclusively for the Commission. Thus, when the Commission determines it necessary to specify the type of vehicle to be used in order to fully and adequately carry out its legislative mandate to specify the service to be rendered, it is acting within its authority as found and determined by the interpretations by this Court of the pertinent statutes.

On page 5 of its brief, appellant claims that the phraseology of the Commission's Order (R. 116-117) permits appellant to operate a forty passenger bus but only to carry six people therein. This is a ridiculous contention as is its contention, page 19 and page 24 of its brief, that the Commission was seeking by indirection to do what it had no legal right to do, to wit, define a service to be rendered, among other things, in terms of the type of vehicle to be used. The obvious intent of the phraseology used by the Commission was to restrict appellant to the same personalized flexible type of service which it had rendered on and prior to the Grandfather date, and which type of service could not be rendered with larger vehicles. The reason for the use of phraseology limiting the carriage to six passengers rather than to a sedan is explained when reference is had to the Commission's decision in the *Nudelman* case, 28 M. C. C. at page 96. There the Commission said:

> "Although they heretofore have conducted the operations in automobiles of the sedan type and the record indicates that they desire to conduct the op-

erations with this type of vehicle, we do not agree that they should be limited to the use of such vehicles. Such limitation would prevent them from using open cars or so-called beach and station wagons, although such vehicles might be as well adapted to their particular type of service as automobiles of the sedan type. We believe, however, that in view of the evidence offered by applicants and the nature and type of the operations under consideration, any authority granted herein should be limited in such a way as to prevent them from instituting a service competitive with those of protestants and other common carriers, and different from that which they have been performing and which the record shows they desire to perform. In the circumstances, we conclude that any authority granted herein shall be restricted to the transportation of passengers and their baggage, in special operations in non-scheduled, door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof and not including children under ten years of age who do not occupy a seat or seats. This, in effect, limits the service to be rendered to certain types of vehicles and, at the same time, makes possible a more flexible form of authority which specifies as completely as necessary *the kind or character of 'the service to be rendered'*." (Italics ours.)

Appellant's claim on page 11 of its brief that the Commission sought to restrict a carrier from using a different type of vehicle, even though such use would not change the character or type of the service theretofore rendered, is without basis in view of the Commission's determinations that in the particular type of service rendered by appellant the type of vehicle constitutes such an integral part as to be required in any definition or specification of service.

In this kind of case, the change in type of vehicle could not help but produce a change in type of service.

A taxicab operating on the streets of New York can carry people up and down Fifth Avenue, but if it changed from the taxicab type of vehicle to a bus, it could not help but change the type of its service, even though it still carried people up and down Fifth Avenue. Such is the case here.

Reference to the affidavits constituting the proof submitted by appellant's predecessors (R. 62-76 inclusive) shows that appellant's predecessors on the Grandfather date operated a highly specialized service, personalized and flexible, through the use of sedans, and different from the regular route bus operations.

On page 10 of its brief, appellant quibbles over the use by the court below of the word "quality" in referring to its type of service. The Court used the word "quality" to differentiate from the word "quantity" or amount of service which might be given. Its use of the word "quality" was used in the sense of character or type in referring to the service rendered. It was not used in the sense advanced by appellant in its quibbling argument on page 10 where it would interpret the Court's use of that word in the light of pleasing or satisfactory service.

Appellant is seeking to force from the Commission a certificate containing a specification of service which would permit appellant to inflate its prior Grandfather claims into a totally different type of service in an entirely different competitive field. To permit this would be to defeat all regulation by the Commission. To permit it would be to destroy eight years of work, during which the Commission has succeeded to a substantial degree, through its regulation, in bringing about sound economic conditions in the motor carrier industry.

The interpretation of United States Code, Title 39, Section 308(a), as made by the Commission and the Court below is correct.

POINT II.

United States Code, Title 39, Section 308(a), (Section 208(a), Interstate Commerce Act, Part 2), not only directs the Commission in issuing a certificate to specify the service to be rendered but further provides:

> "* * * and there shall, at the time of issuance, and from time to time thereafter, be attached to the exercise of the privileges granted by the certificates such reasonable term, conditions and limitations as the public convenience and necessity may from time to time require."

Appellant objects to the Commission's action in carrying out its legislative mandate wherein the Commission, in order to properly define and specify the service to be rendered of necessity had to define it in terms of the type and character of appellant's Grandfather service.

Appellant's objections run to the definition or specification of service which in effect declares that the Grandfather operations of appellant were over irregular routes, and was a non-scheduled, door to door special service.

That appellant's Grandfather service, and therefore the type of service which it is entitled to continue, was an irregular route operation is clear from its very application. Its supplemental Exhibit A-2-a (R. 49) definitely stated that it carried passengers from the territory comprising the Borough of Bronx in the City of New York, to the Counties of Sullivan and Ulster in the State of New York, via New Jersey, and stated that the area of destination in those upper New York State Counties was

that part of the said Counties "within a radius of twenty miles from the Town of Woodbourne, New York." That same Exhibit (R. 49) shows a map prepared by the applicant and filed with the Commission, which shows the area of distribution of passengers by a large irregular circle. That Exhibit was filed in connection with the supplemental application filed March 26, 1937. The applicant at a later date in a further supplemental Exhibit A-a-1, on January 25, 1937, filed another statement and map (R. 49) which made the same statement, and which map contained the same area of distribution of passengers. In addition, the affidavits submitted to the Commission by applicant (R. 64-76) showed the irregular route type of operation in which applicant carried passengers from the area comprising the Bronx in the City of New York, and any place therein, to any place in the mountains within a radius of twenty miles from Woodbourne. Such an operation is a radial, irregular route operation and cannot be considered a regular route operation between fixed termini because a regular route operator not only must operate between the fixed termini, but it can never leave its regular route except in case of accident or emergency. Appellant and its predecessors could and have carried passengers in their special operations to whatever point the passengers desired to go within the territory served.

Appellant argues in its brief, on page 7, and again on pages 30 to 33, that in order to get from the New York territory to the mountain territory, there is only one route through New Jersey and to upper New York State as far as Wurtsboro. This is not so, because there are parallel roads all the way, but it is true that the most practical way for appellant to operate would be over the direct route, which would mean that in most cases in serving the territories at each end, one road would be

used for part of the interim trip. This in no way changes the fact that the operation is not a regular route operation, but is instead a radial territorial operation over irregular routes, because, at the points where appellant can pick up or discharge its passengers, it can operate over any road to any point within the authorized territory.

This Court has recognized the fact that a route is an irregular route under such conditions even though a part of the distance is always traversed over a particular highway.

In the case of

United States v. *Maher*, 307 U. S. 148,

the Court said, at page 155, that:

> "The appellee had been engaged in quite different services from those for which it asked a certificate, namely, an irregular, so-called, anywhere-for-hire operation in Oregon with occasional trips to points in Washington over any route adapted to a particular trip, *but using at least for part of the distance U. S. Highway 99 on trips to Washington. These irregular operations were discontinued after the appellee's regular route was established.*" (Italics ours.)

The Court in that case then proceeded to deny the application because the operator had abandoned the irregular route operations which had used one road for part of the same and substituted, in lieu of such irregular operations, a regular route, without Commission authority.

Thus this Court has answered the claim of appellant herein by declaring that an irregular route remains an irregular route even though for a portion of it the same highway may regularly be used.

Appellant further claims (p. 32 of its brief) that the opinion of the Court below permits it to operate between fixed termini. The lower Court did not so hold. It merely, in effect, stated that if appellee picked up a passenger at its ticket store or office in New York City to take to some hotel in the mountain area, such a pick up would not violate the door to door description prescribed by the Commission, and that this would naturally apply in the reverse direction. Nothing therein contained could be considered to permit the appellant to regularly run between fixed termini because then it would be conducting a regular route operation between fixed termini. If, on different occasions, a passenger might want to be picked up at a particular spot in New York City, and carried to another particular spot in the mountains, the mere fact that this happened a number of times would not change the character of the door to door service rendered by appellant, and would not authorize regular route operation between fixed termini.

A taxicab in New York City frequently carries people from one address on Fifth Avenue to another address on that avenue. That does not change the taxi to a regular route operator between fixed termini.

The claim of appellant that it operated between fixed termini (its brief, p. 32) is not borne out by any of the evidence, and its own application above referred to and the affidavits presented in support of that application (R. 64-76) show the operation to have been an irregular route and not a regular route operation between fixed termini.

Appellant knows what it can operate if it wishes to continue the same type of operations conducted on the Grandfather date. It does not wish to do that, but wishes to change to a regular route bus operation between fixed termini, and it has no right in law or in justice so to do.

Appellant's complaint that the Commission improperly described its service as a door to door service is not borne out by the record. Instead the record adequately supports this specification by the Commission, and appellant's evidence submitted to the Commission in the form of affidavits (R. 64-76) shows that the service rendered was a door to door service in which people were taken from their homes in New York City to hotels, boarding houses and clubs in the mountain area. In fact, these affidavits praise the service because it did that very thing which regular route carriers did not do, and took "people to hotels located in all roads and by-roads" (R. 64). Likewise the advertisements submitted to the Commission as exhibits showed that appellant held itself out to take people (R. 80)—

"From Your Home to Your Hotel."

The service was a personalized service, and it remains door to door whether the person be picked up at his own home or after shopping in the down town section should request to be picked up at a store or office in the shopping district.

Appellant's objection to the action of the Commission in specifying its Grandfather operations, and therefore its authorized operations, as "non-scheduled operations", has no basis in fact or in law.

The record (see affidavits submitted by appellant as proof, R. 64-76) shows the type of operation to have been a personalized, non-scheduled operation in which people were picked up to suit their convenience. The affidavit of Mr. Feldman refers to that type of service as extremely convenient (R. 69), and the same is true with reference to the affidavit of Adela Dingelthal (R. 73). Furthermore, such type of interstate livery service is of necessity non-scheduled if it is to fulfill its true purpose

and play its part in the national scheme of adequate transportation.

Appellant's claims (at pp. 33 and 34 of its brief), that the Commission has not included the words non-scheduled in defining other special types of operations are without weight because each case must stand upon its own facts.

Appellant's questioning the power of the Commission to include such a definition because the statute does not specifically authorize the same is likewise without merit. If the Commission were confined to the exact words in the statute, it could never carry out the legislative mandate to specify the service to be rendered.

Appellant's claim that the Commission and the Court erred in classifying its operations as "special operations" is hard to understand. All operations in the case of passenger certificates are of necessity either regular route operations between fixed termini, or special operations. This is not true of property carriers as distinguished from passenger carriers, because there the certificate may authorize either operation over regular routes and between fixed termini or between territories to be served without specifying the latter as special operations. The reason that in passenger cases all authorizations other than over regular route and between fixed termini must be classified as special operations is that provision in Section 207(a) of Part 2 of the Interstate Commerce Act (United States Code, Title 39, Section 307(a)), where the statute reads:

> "Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes and between fixed termini, *except* as *such carriers may be authorized to engage in special or charter operations.*" (Italics ours.)

There is nothing in the designation "special" which in appellant's case can prevent it from selling individual passage to different people in the same sedan vehicle. The examples cited in appellant's brief, page 36, of special operations authorized by the Commission are not all inclusive but rather are examples of proper specification of operations permitted by the Commission. Each case is determined by its own circumstances of proof.

The lower Court properly interpreted the Commission's definition of special operations.

Appellant's contention, at page 39 of its brief, that the above quoted proviso contained in Section 207(a) does not apply to Grandfather operations is error. That Section provides for the issuance of certificates.

The Grandfather Section, 206(a), merely dispenses with the proof of necessity and convenience otherwise required under Section 207.

The record supports the action of the Commission in defining and specifying appellant's authorized service as irregular route, door to door, non-scheduled, special operation. It is within the province of the Commission to exercise its expert judgment upon the facts and use such language as will carry out the legislative mandate to specify the service.

In the case of—

Noble v. *United States*, 45 Federal Supp. 793,

the United States District Court for the District of Minnesota, in referring to this point, said:

> "This means that the Commission could select the language and the method of specifying the scope of the business. Unless the Commission had such authority, it cannot carry out the announced policy of Congress."

That case was appealed to the United States Supreme Court and affirmed, and this Court, in that same case, 319 U. S. 88, 63 Supreme Court Reporter 950, said:

> "Since the Commission did not apply an incorrect standard in defining the nature of appellant's business and its scope, our function is at an end. The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission."

In the case of—

> *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475,

this Court said:

> "We express no opinion on the scope of the certificate which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission."

The Commission acted within its lawful authority in defining appellant's service.

POINT III.

Appellant contends that the Commission erred in making its order of September 2, 1941 because it did not hold a hearing between that date and June 20, 1938, the date of its previous order, which had been protested, and which therefore never became effective.

There was no reason for the Commission to hold any further hearing. No request was made for any further hearing by the appellant or its predecessors.

Appellant's contention on page 6 of its brief that the Commission should have held a hearing because protestants in their protests had questioned the evidence adduced by applicant is certainly not a claim appellant can properly make. If anyone was injured, it was protestants, and they are not complaining but rather supporting the Commission's action. The Commission accepted the undisputed evidence of appellant and its predecessors at its face value and applied the law as it was determined on September 2, 1941. There were no factual questions at issue of which appellant can complain because its evidence was accepted at full face value and remains undisputed. The issue which was being contested during the years 1938 to 1941 was a legal issue, and appellant was given ample opportunity to argue this issue before the Commission. It did that very thing, first, in its protest and supporting brief, dated October 7, 1941 (R. 117-119), and, after Division 5 of the Commission had disagreed with it, appellant again had the opportunity to argue this question before the entire Commission in its petition for reconsideration by the entire Commission, filed April 6, 1942 (R. 132-136). When the entire Commission disagreed with appellant, it again re-argued the matter before the Commission in its petition to re-argue, filed October 10, 1942 (R. 158-161).

Since the issues were legal rather than factual, there was no reason for any further factual hearing, and the Commission gave appellant ample opportunity to argue the legal point involved.

Appellant had never obtained a certificate. Its proceedings were pending before the Commission, and its compliance orders of 1938 never became effective because of the filing of protests against them, and the Commission, when it finally determined the case, properly acted under the proper and lawful interpretation of the statute as

then made. The long delay in finally determining the case was the result of differences in opinion within the Commission, which were only fixed and determined by the long *Nudelman* litigation, which concluded in 1941. Appellant was not prejudiced because the Commission has given to it everything which it asked for in the application filed by its predecessors and everything to which it is lawfully entitled.

Appellant, at page 40 of its brief, apparently misconstrued the compliance order of June 20, 1938, and fails to recognize it as merely a step in the proceedings which was nullified by the timely filed protests. It never vested in appellant any rights because the Commission had not made its final determination. It was more like a pleading in a cause rather than any decree therein.

The Commission had to issue the correct order because the law in 1941 had been determined. This Court has held such to be the requirement by analogy in the case of

Ziffrin, Inc. v. *United States*, 218 U. S. 73, 63 Supreme Court Reporter 465.

In that case, the Court said:

> "We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. • • • Previously appellant had been operating under an *ex parte* permit. • • • A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law. • • • *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts."

The action of the Commission was not only proper, but it was the only action which the Commission could have lawfully taken.

Conclusion.

Appellant's contentions strike at the very root of the Interstate Commerce Commission's ability to continue public regulation of motor carriers. If its contentions were to be accepted, regulation of such carriers would to a major degree be destroyed. Such an interpretation would thus destroy the expressed intent and purpose of the Act. Therefore it cannot be the correct interpretation.

The action of the Commission is supported by appellant's own undisputed proof, and, based upon that evidence, the Commission applied the law as this Court itself has interpreted it in the cases herein cited.

The action of the Commission and the action of the lower Court in dismissing appellant's complaint should be affirmed.

Respectfully submitted,

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Dated: November 1, 1943.